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Nos. 06-1454, 06-1457, 06-1462, 06-1468

In the

Supreme Court of the United States

SEMPRA GENERATION *et al.*, PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CA, *et al.*

MORGAN STANLEY CAPITAL GROUP, INC., PETITIONER,

v.

PUBLIC UTILITY DIST. NO. 1 OF SNOHOMISH COUNTY WA, *et al.*

CALPINE ENERGY SERVICES, L.P., *et al.*, PETITIONERS,

v.

PUBLIC UTILITY DIST. NO. 1 OF SNOHOMISH COUNTY WA, *et al.*

DYNEGY POWER MARKETING, INC., *et al.*, PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CA, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATURAL GAS SUPPLY ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AS *AMICI CURIE* IN SUPPORT OF THE PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

Under the Natural Gas Act and the Federal Power Act, as interpreted by this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and in *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), the Federal Energy Regulatory Commission may not modify valid contracts except in extraordinary circumstances of unequivocal public necessity. In conflict with this Court's decisions and those of other Courts of Appeals, the Ninth Circuit held that the Commission may nullify a wholesale power contract, even in the absence of public necessity, if the contract rates were not pre-approved by the Commission or if the contract is later deemed to have been formed during a period of market "dysfunction."

The questions presented are:

1. Whether the Ninth Circuit erred in failing to abide by this Court's decisions precluding the Federal Energy Regulatory Commission from retroactively abrogating valid, wholesale power contracts absent a showing that abrogation is required in the public interest.

2. Whether the Ninth Circuit erred in effectively determining that the *Mobile-Sierra* public-interest standard applies to sellers, but not buyers, that are seeking to escape the terms of freely negotiated wholesale power contracts.

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INTEREST OF *AMICI CURIAE*[1]

The Natural Gas Supply Association ("NGSA") represents U.S.-based producers and marketers of natural gas on issues that broadly affect the natural gas industry. The Independent Petroleum Association of America ("IPAA") represents independent oil and natural gas producers and associated service companies. As the voice of the producers and marketers who find, produce, sell, and deliver most of the Nation's natural gas supply, NGSA and IPAA work to ensure reliable and efficient delivery of natural gas to end-consumers and to increase the supply of natural gas to domestic markets. NGSA's and IPAA's members have made significant financial commitments in reliance on the current structure of the Nation's energy markets. These commitments are necessary to satisfy the demand for natural gas for all end-uses—including electric power produced by natural gas generation facilities, which represents the single fastest growing

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[1] Petitioners and respondents have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored any part of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The attorneys preparing this brief direct the Court's attention to the fact that a second brief as *amici curiae* will be filed in these same cases on behalf of the Electric Power Supply Association and others by different attorneys from the same law firm. Although the attorneys working on the two briefs have shared work product and engaged in joint efforts, the resulting briefs are independent statements reflecting the independent views of the respective clients on whose behalf the two individual briefs are being filed.

component of natural gas demand in the United States.

The decisions of the Ninth Circuit below place in doubt the willingness of that Circuit and the ability of the Federal Energy Regulatory Commission faithfully to apply this Court's landmark, half-century-old, decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), at least as those decisions apply to market-based rate contracts for electricity. The Ninth Circuit decisions have therefore cast a pall of uncertainty over future investments in electric generating infrastructure, including infrastructure designed to run on natural gas. More broadly, the decisions raise troubling questions as to how far any tremors from the precedential aftershocks of the Ninth Circuit's doctrinal departures will radiate out from electricity markets and into natural gas markets within the Commission's jurisdiction. Depending on their magnitude, those precedential aftershocks risk unsettling crucial parts of what had been thought to be settled rules and practices governing natural gas transactions. It is for these reasons that NGSA and IPAA are taking the unusual step of making their views known to the Court, even though the underlying decisions, properly interpreted, do not apply to the natural gas industry.

INTRODUCTION

Over a half-century ago, this Court first articulated what has come to be known as the *Mobile-Sierra* doctrine. The Court described that doctrine as embodying Congress's "reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956); *see also Federal Power Commission v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). Since then, the courts and (with some infrequent exceptions) the Commission have consistently and wisely declined invitations to modify the terms of fixed-price bulk energy contracts except in "*extraordinary* circumstances" where revised contract terms are clearly "*necessary* in the public interest." *Mobile*, 350 U.S. at 344 (emphasis added).

Regulatory certainty, including the assurance that contracts for Commission-jurisdictional services are protected by *Mobile-Sierra*, has played a central role in the Nation developing and maintaining "the largest and most liquid gas market in the world." National Petroleum Council, Balancing Natural Gas Policy: Fueling the Demands of a Growing Economy, at 48 (2003). Together with pro-competitive initiatives adopted by Congress and the Commission, regulatory certainty has produced robust natural gas markets that enable the natural gas industry to respond effectively to price signals. Most importantly, markets conveying clear price signals have prompted billions of dollars of investment in North American gas infrastructure, representing an "important market success story" that sharply

contrasts to the endemic underinvestment experienced under past regulatory regimes. FERC, 2004 State of the Markets Report, at 7, 145 (June 2005); *see also* EIA, The Majors' Shift to Natural Gas, at 19 (2001). Regulatory certainty has thus enhanced the stability of natural gas supplies, which is essential to keeping gas prices at reasonable levels in a growing economy. *See* Asia Pacific Energy Research Centre, Natural Gas Market Reform in the APEC Region, at 149 (2003) ("APEC Region"). The happy result has been an "exciting new industry characterized by free market enterprise, competition and continual innovation." Bob Shively & John Ferrare, Understanding Today's Natural Gas Business, at 1 (2004).

The Ninth Circuit's doctrinal departures threaten to undermine these successes. If allowed to stand, the decisions risk exposing American consumers to the same types of high and volatile prices and frequent supply shortages that prompted Congress and the Commission to discard the regulatory practices of the past in favor of supply arrangements that are at once more flexible, more stable, and more reliable.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to correct the Ninth Circuit's unwarranted and unwise judicial policymaking in an industry of central national importance. As petitioners explain, by setting aside congressional policy, the Ninth Circuit decisions have opened a conflict with the longstanding precedent of both this Court and other Courts of Appeals. Because fuel costs are the largest variable cost involved in producing electricity, the lower

court's destabilization of the already volatile electricity market could have significant spillover effects in the Nation's natural gas markets. (*See* Section I, below.) Moreover, by calling into question the Ninth Circuit's respect for *Mobile-Sierra*'s well-understood principles, the decisions below may infect the natural gas markets with legal uncertainty—in the form of fears that the Ninth Circuit's unwise decisions might be improperly extended to encompass certain natural gas transactions. (*See* Section II, below.) Both types of disruption threaten the interests of the very consumers the Ninth Circuit decisions were intended to protect.

I. Because The Nation's Electricity And Natural Gas Markets Are Increasingly Interdependent, The Ninth Circuit Decisions Could Spill Over Into Natural Gas Markets.

The Ninth Circuit decisions dramatically depart from this Court's precedents by inventing a new test for determining whether *Mobile-Sierra*'s public-interest standard applies to wholesale power contracts that incorporate market-based rates. The decisions fundamentally alter the *Mobile-Sierra* standard by creating a one-way ratchet according to which buyer's remorse—but not seller's remorse—can supply a basis for invoking the public interest to abrogate voluntarily-negotiated contract rates. In so-called "high rate" cases, the Ninth Circuit decisions hold, for the very first time, that the Commission *must* modify contracts in all instances where rates are deemed to be outside some subjectively defined "zone of reasonableness."

If the Ninth Circuit decisions are allowed to stand, the most immediate result would be the destabilization of the Nation's electricity markets. Next, because electricity generation is a large and fast growing user of natural gas, *see* APEC Region, at 143 (the "fastest growth in gas use is projected to occur in the electric power sector, with demand more than doubling"), the uncertainty those decisions have engendered in electricity markets will inevitably splash back into the market for the natural gas supplies used to fire much of the Nation's electric generating capacity. *See* FERC, 2006 State of the Markets Report, at 3 (2007) ("2006 Markets Report") ("[a]though we often consider energy markets as distinct (e.g., electricity and natural gas), they increasingly influence one another").

Under the Ninth Circuit's approach, generators that use natural gas to power generating facilities will be unable to rely on stable, long-term contracts to sell the electricity they generate. The precise adjustment that the markets will make to this unexpected legal development is not yet clear. But what is clear is that, precisely because they may no longer enter stable *sales* contracts with electricity customers, power generators may take a much different view of making the multi-million dollar commitments necessary to add new electric generation capacity—the great majority of which is fired by clean-burning natural gas. By calling into question the economic viability of facilities that purchase and consume natural gas, the decisions below cannot help but have substantial impacts on the natural gas industry.

Another likely result of the Ninth Circuit's doctrinal shift is a destabilization of electric power generators' purchases of natural gas on the spot market. *See generally* Eli Goldstein & Warren Young, Regulatory Failures and Regulatory Successes: The Case of U.S. Electricity Regulatory Reforms, at 8 (2002). The Ninth Circuit decisions, particularly the one-way ratchet set in place by those decisions, will discourage generators from entering into long-term contracts to sell electricity and undermine their ability to rely on existing long-term contracts. Long-term contracts that are voidable by electricity customers, but not by electricity generators, will be seen as having much less value from the perspective of generators. This will in turn render generators less willing and less able to make long-term commitments with suppliers of natural gas and other fuels, inevitably pushing greater volumes of natural gas transactions to compete for the more volatile supplies traded through spot market purchases. Generally speaking, the greater the proportion of natural gas sold through the spot market, and the more questionable the legal validity of the contracts used to hedge spot market risks, the more market participants of every description will be at the mercy of fluctuations in spot market prices.

For these reasons, the Ninth Circuit decisions make events like the California energy crisis of 2000-2001 more likely to recur. Moreover, because of the iterative nature of market responses in the closely related markets for electricity and natural gas, the Ninth Circuit's policies create circumstances conducive to a vicious cycle of instability across both markets. "Since the availability and price of natural gas directly affects electricity markets and electricity

prices and because so much of the electricity generation added in the past decade, and planned to be added in the future, is gas-fired, all consumers across the Nation are likely to experience the impacts of energy price and supply volatility twice, on both their gas and electricity bills." National Association of Regulatory Utility Commissioners, Gas and Electricity Interdependence: The Current Situation and Intermediate and Long-Term Solutions, at 1 (2003). This Court's review is needed in order to short circuit this cycle before it begins.

II. The Ninth Circuit Decisions Introduce Uncertainty By Undermining The Principal of *Stare Decisis* And The Doctrinal Stability Of This Court's *Mobile-Sierra* Regime.

In addition to the Ninth Circuit decisions' indirect impacts on natural gas markets through their effects on electricity markets, NGSA and IPAA are concerned about potential direct adverse impacts of those decisions in the event they were to be improperly construed as applying to Commission-jurisdictional sales of natural gas. To be clear, despite similarities between the Natural Gas Act and the Federal Power Act, there are critical legal, factual, and economic distinctions that dispositively militate against extending the Ninth Circuit decisions to natural gas sales. Accordingly, even assuming the decisions below were correct in the electricity context in which they were decided (they are not), there still could be no legitimate basis for applying those decisions in the context of sales of natural gas.

In contrast to wholesale sales of electricity, a substantial proportion of natural gas sales are not

subject to rate regulation by the Commission. Congress found that markets for natural gas at the wellhead and in the field were competitive and therefore decontrolled rates for so-called "first sales" of natural gas. *See* 15 U.S.C. § 3431(b)(1)(A) (2000) ("for purposes of [the rate provisions] of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable"). Accordingly, the Natural Gas Act now limits the Commission's ratemaking jurisdiction over sales of natural gas for resale in interstate commerce to subsequent sales. *See* 15 U.S.C. § 717(b) (2000). Moreover, the Commission has used its expertise and authority to pre-authorize non-"first sales" for resale at "negotiated rates." 18 C.F.R. § 284.402(a) (2007); *see also* 18 C.F.R. § 284.284(a) (2007). The Commission embraced this market-oriented approach based on findings that it could rely on "market forces at the wellhead or in the field" to constrain resale gas prices within the Natural Gas Act's "'just and reasonable' standard." *Pipeline Serv. Obligations and Revisions to Regulations Governing Self-Implementing Transp. Under Part 284 of the Commission's Regulations*, Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,440 (Apr. 8, 1992), *on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (Aug. 3, 1992), *on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Dist. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

The decisions below do *not* apply to Commission-jurisdictional sales for resale of natural gas. Nor do they purport to reverse the elaborate statutory and regulatory superstructure that has been built by

Congress and the Commission to develop and govern well functioning markets for natural gas. Nonetheless, the Ninth Circuit's willingness to depart from precedent in one context (market-based rate sales of electricity) suggests the possibility of comparable departures in a second context (market-based rate sales of natural gas). By raising the specter that its misguided decisions might come to infect market-based rate regulation of non-"first sales" for resale of natural gas, the Ninth Circuit has threatened the longstanding regulatory certainty secured by *Mobile-Sierra*. Such certainty is essential to well-functioning natural gas markets, because only stable and well known contracting rules can permit buyers to lock in particular prices and quantities of natural gas using negotiated contracts adapted to their own particular needs.

Although the Ninth Circuit decisions will have the most immediate impact on regulatory certainty in the context of electricity contracts, there can be no assurance that the decisions' ultimate reverberations will be so limited. If the Ninth Circuit can, at the stroke of a pen, discard a half-century-old legal standard as to one class of contracts, and if it can turn a balanced and parallel contracting rule into a one-way ratchet, what is to prevent similar treatment of the doctrine as regards other classes of contracts? What is to prevent innovations in other doctrines? And what, ultimately, is to prevent the Ninth Circuit or other lower courts from revamping *any* foundational rule governing energy markets?

The Ninth Circuit's policy innovations have broad implications for stability, predictability, and legal expectations throughout the energy industry. At

present, "buyers of natural gas have options to reduce their exposure to volatile prices," both through stable contracts to buy physical gas, as well as financial hedging instruments. GAO, Meeting Energy Demand in the 21st Century, GAO-05-414T, at 16 (March 16, 2005); *see also* 2006 Markets Report, at 44 ("buyers and sellers would largely lose the benefits of hedging if there were no speculators willing to assume the risk that hedgers want to lay off"). At their most fundamental level, however, the decisions below have imperiled the viability of these risk-reducing options.

The *Mobile-Sierra* doctrine, and the respect for settled expectations it demands, may appear to the uninitiated as mere abstractions. But to participants in the Nation's energy markets, the doctrine is omnipresent. A simple search of the Westlaw legal database that collects Commission decisions shows that of the approximately 5,000 administrative decisions rendered by the Commission since 2000, over 600 (approximately one in eight) mention *Mobile-Sierra*. It may be only a slight exaggeration, if it is an exaggeration at all, to say that *Mobile-Sierra* is to energy regulation what the *Miranda* rule is to the law of criminal arrests. *Cf. Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).

Although the Ninth Circuit did not hesitate to depart from the settled understandings of the Federal Power Act, this Court has long recognized that a set of stable and consistent legal rules serves crucial functions. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (considerations "in favor of *stare decisis* are at their acme in cases involving property and contract rights"). As many of this Court's

decisions have observed, clear legal rules discourage costly litigation that would otherwise entail substantial direct costs, and then impose still further costs by engendering additional rounds of follow-on litigation as needed to clarify any remaining uncertainty.

Energy suppliers, like other market participants, "require clear signals regarding national policies and confidence that those policies will be sustained over time in order to undertake the substantial investment needed to support expected increases in consumption." GAO, Meeting Energy Demand in the 21st Century, GAO-05-414T, at 7-8 (March 16, 2005). These important supply signals can only be scrambled if prices are to be set from time to time according to a heavy and unpredictable regulatory hand empowered by indefensible departures from judicial precedent.

This Court has often recognized that principles of *stare decisis* carry maximum force in contexts where, as here, statutory as opposed to constitutional policies are at issue. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 523 (2005) ("[c]onsiderations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades"). In addition, the Court has sometimes found it necessary to remind lower courts, including the Ninth Circuit, that only this Court may revisit one of the Court's own precedents. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (once this Court has "determined a statute's clear meaning," it adheres "to that determination under the doctrine of

stare decisis"); *see also California v. FERC*, 495 U.S. 490, 499 (1990) (recognizing the respect "this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes"). Against this backdrop, the Ninth Circuit decisions must be viewed as an assault, not only on the *Mobile-Sierra* doctrine, but also on principles of *stare decisis* more generally.

Any change in a legal regime that acts, as do the Ninth Circuit decisions, to replace settled rules with vague administrative directives necessarily opens a door to arbitrary agency decisionmaking. Having now "bargain[ed] in the shadow" of *Mobile-Sierra* for more than five decades, *Boston Edison Co. v. FERC*, 233 F.3d 60, 66 (1st Cir. 2000), energy market participants have ordered their affairs on the assumption that the Commission will be allowed to modify contracts only in accordance with *Mobile-Sierra*'s narrow and well-defined understanding of "extraordinary circumstances" of "unequivocal public necessity." *In re Permian Basin Area Rates Cases*, 390 U.S. 747, 820-22 (1968). Upsetting those expectations not only engenders uncertainty, it invites an interlude of impossible-to-predict agency reaction. The risk that market participants will be unnecessarily subject to the whim of uncertain Commission policies poses an undeniable further threat to the stability of our Nation's energy markets—one that can and should be defused by this Court's review of the decisions below.

CONCLUSION

For the foregoing reasons, and for reasons set forth in the petition, the Court should grant the writ of *certiorari*.

Respectfully submitted,

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